

Title	Standards of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases (adopt rules 1620 through 1620.9 and 1622 of the California Rules of Court).
Summary	These rules would establish minimum standards of conduct for mediators when serving in court-connected mediation programs for general civil cases and require courts to establish procedures for handling complaints against mediators serving in such programs.
Source	Civil and Small Claims Advisory Committee, Subcommittee on Alternative Dispute Resolution
Staff	Heather Anderson, 415-865-7691
Discussion	<p><u>Background</u></p> <p>Courts throughout California are increasingly offering mediation programs to assist civil litigants in resolving their disputes. Many courts refer or order cases to mediation, maintain panels of mediators, or provide lists of available mediators to litigants.</p> <p>Mediators are not licensed or certified by the State of California, and there are currently no statewide ethical rules or standards of practice governing mediators in court-connected civil mediation programs. Some individual courts have adopted standards for mediators serving in their programs; however these standards are not uniform. Professional associations have also developed several sets of standards to which mediators may voluntarily subscribe. California has adopted Uniform Standards of Conduct for Court-Connected Child Custody Mediation (Cal. Rules of Court, rule 1257.1), and numerous other states have adopted standards for court-connected civil programs.</p> <p>In 1999, the Judicial Council's Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System recommended that the council appoint a group to develop a set of model ethical standards for court-related mediation programs.¹ Acting on this recommendation, the ADR Subcommittee of the Civil and Small Claims Advisory Committee formed a Working Group on</p>

¹ Judicial Council of Cal., Task Force Rep., Alternative Dispute Resolution in Civil Cases (Aug. 1999) p. 92, recommendation 14, available at <http://www.courtinfo.ca.gov/reference/documents/adrreport.pdf>.

Ethical Standards for Mediators in Court Connected Mediation Programs. The working group, consisting of judges, court-related ADR program administrators, mediators, attorneys, and others, developed the proposed rules during an 18-month process that included extensive informal public input.

The rules are being proposed for adoption by the Judicial Council in April 2002. A deferred effective date of January 1, 2003, is being proposed to provide advance notice of the rules and to allow time to implement the standards and complaint procedures.

Your comments are requested concerning both the text of the proposed rules and the advisory committee comments.

Summary of the Proposed Rules; Request for Specific Comment

The proposed rules address the following topics:

Rule 1620. Purpose and function. These rules would establish minimum standards of conduct for mediators in court-connected mediation programs for general civil cases and would guide mediators, inform and protect participants, and promote public confidence in the mediation process and the courts.

Rule 1620.1. Application. These rules would apply to mediators when they are selected from a list of mediators provided by a court to mediate a case pending in the court or when they are recommended, selected, appointed, or compensated by a court to mediate such a case. The rules would not apply to judges or other judicial officers governed by the Code of Judicial Ethics, while serving in that capacity.

Rule 1620.2. Definitions. This rule would define “mediation,” “mediation consultation,” mediator,” “participant,” and “party,” as used in rules 1620 through 1620.9 and rule 1622.

Rule 1620.3. Voluntary participation and self-determination. This rule would require mediators to inform participants at the outset of the process that any agreement reached in the mediation process must be voluntary and uncoerced; to respect each party’s right to determine the extent of his or her participation in the process, including the right to withdraw from the mediation at any time; and to refrain from coercing any party to make a decision or unwillingly continue to participate in the mediation.

Several courts have programs in which they order parties to mediation. Rule 1620.3 and the accompanying comments reflect the view that, regardless of whether the parties get to mediation by court order or voluntary agreement, it is a fundamental principle of mediation that, once there, they are free to choose the extent to which they will participate in the process. Underlying this view is the belief that mediation's essence is the consensual nature of the process – it relies, both for eliciting the parties' participation and for its ultimate success, not on any authority to decide for the parties, but on the mediator's skill in facilitating communication between the parties and the parties' own power to make decisions about the resolution of their dispute.

Others believe, however, that mandatory, court-ordered mediation should be treated differently from mediation entered into by voluntary agreement. They believe that a court's order to mediation contemplates not only the parties' attendance, but also their good faith participation in the process once there. In this view, requiring only that the parties attend, but allowing the parties to determine whether to participate in the process once there, undermines a court's authority to order mediation. A rule specifically requiring parties to participate in good faith in mandatory court-ordered mediation has therefore been suggested.

We note that the statutes governing mandatory, court-ordered mediation programs provide:

“In the event that the parties to mediation are unable to reach a mutually acceptable agreement and any party wishes to terminate the mediation, then the mediator shall file a statement of nonagreement.”²

We also note that the ability to obtain information about what occurred in the mediation is very limited. The California Supreme Court recently held in *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*³ that, under the statutes governing mediation

² Code of Civil Procedure section 1775.9. Code of Civil Procedure section 1739, which applies to the early mediation pilot programs operating in five courts, contains an identical provision that is identical except that it clarifies that the parties wish to terminate the mediation can come at any time: “In the event that the parties to mediation are unable to reach a mutually acceptable agreement and any party wishes to terminate the mediation *at any time*, then the mediator shall file a statement of nonagreement.”(Code of Civil Procedure section 1739). A statement of nonagreement is report, filed using Judicial Council form ADR-100, informing the court that the mediation ended without the parties reaching agreement.

³ (2001) 26 Cal.4th 1.

confidentiality,⁴ a mediator may not report to the court about the conduct of participants in a mediation session and neither a mediator nor a party may reveal communications made during mediation.

Your comments are therefore requested on whether a rule should be adopted that provides that in mandatory, court-ordered mediations the parties are expected to participate in good faith in the mediation process.

Rule 1620.4. Confidentiality. This rule would require mediators to observe the law concerning mediation confidentiality and to inform participants that, except as otherwise provided by law or agreement, mediations are confidential. Mediators would also be required to inform participants of his or her policy regarding confidentiality of separate (caucus) communications before speaking separately with participants. Mediators would be prohibited from using information acquired in confidence in the course of a mediation for personal gain or to the detriment of any participant.

Rule 1620.5. Impartiality, conflicts of interest, disclosure, and withdrawal.

This rule would require mediators to maintain impartiality toward all participants in the mediation process at all times. It also would require mediators to make reasonable efforts to keep informed about and disclose matters that reasonably could raise a question about their impartiality. The rule would require mediators to withdraw or terminate the mediation if a party objects to the mediator, if the mediator cannot maintain impartiality, if proceeding would jeopardize the integrity of the court or the mediation process, or if the mediator has been an attorney or a material witness concerning the matter. Mediators would be required to obtain consent before providing any subsequent professional services in a matter substantially related to a matter in which they served as a mediator.

The committee is particularly interested in your comments on the following issues concerning proposed rule 1620.5:

- Should mediators be explicitly required, as under proposed rule

⁴ Evidence Code section 1115 *et seq.* Evidence Code section 1121 specifically provides that, unless the parties expressly agree otherwise, neither the mediator nor anyone else may submit, and the court may not consider, any report to the court by the mediator concerning a mediation conducted by the mediator except a report that states only whether an agreement was reached.

1620.5(d), to discuss any questions or concerns that a participant may raise about the mediator's ability to conduct the mediation impartially?

- Should the committee add a provision that explicitly requires mediators to maintain records identifying the parties or participants in the mediations that they conduct, in order to facilitate the disclosure (under the proposed rule) of prior service as mediator in a matter involving parties or participants in a current mediation?

Rule 1620.6. Competence. This rule would require mediators to comply with experience, training, educational, and other requirements established by the court; to truthfully represent their background to the court and the mediation participants; and to notify the court of certain disciplinary actions, criminal charges or convictions, and civil judgments against them. The rule would also require mediators to assess whether their level of skill, knowledge, and ability is sufficient to conduct the mediation effectively, and to withdraw if they determine it is not.

Rule 1620.7. Quality of mediation process. This rule would require mediators to conduct mediation proceedings diligently and in a procedurally fair manner, and to inform parties about the mediation process, confidentiality, and roles of the participants. Mediators would be required to inform participants that they will not be representing any participant as a lawyer or performing professional services in any capacity other than as an impartial mediator. This rule also addresses policies and procedures for recommending other services, raising nonparticipants' interests, combining mediation with other alternative dispute resolution processes, and preparing settlement agreements, and specifies the circumstances in which mediators may withdraw from or terminate the mediation.

Rule 1620.8. Marketing. This rule would require mediators to be truthful and accurate in marketing their services. Unauthorized statements concerning court approval of the mediator, promises or guarantees of results in mediation, statements that imply favoritism, and solicitation of business from participants while a mediation is pending would all be prohibited.

Rule 1620.9. Compensation. This rule would require mediators to comply with applicable statutes and court rules concerning

compensation and to clearly communicate compensation terms in writing before commencing the mediation. Unconscionable fees and contingent fees would be prohibited. Mediators would also be prohibited from giving gifts or favors of significant value to, or accepting them from, mediation participants or their affiliates for two years after conclusion of the mediation.

Rule 1622. Complaint procedure. This rule would require courts that make lists of mediators available to litigants or recommend, select, appoint, or compensate mediators to establish procedures for receiving, investigating, and resolving complaints against those mediators. Courts would be permitted to reprimand or remove mediators from the court's list or panel for failure to comply with the rules of conduct set forth in these proposed rules.

Attachments: Proposed rules

Rules 1620, 1620.1, 1620.2, 1620.3, 1620.4, 1620.5, 1620.6, 1620.7, 1620.8, 1620.9 and 1622 would be adopted, effective January 1, 2003, to read:

**PART 1 – RULES OF CONDUCT FOR MEDIATORS IN COURT-
CONNECTED MEDIATION PROGRAMS FOR CIVIL CASES**

Rule 1620. Purpose and function

(a) The rules in this Part establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.

(b) These rules are not intended:

- (1) To establish a ceiling on what is considered good practice in mediation, to discourage efforts by courts, mediators, or others to educate mediators about best practices, or to represent the highest standards of professional mediation practice; or
- (2) To create either a new basis for challenging a settlement agreement reached in connection with mediation or a new civil cause of action against a mediator. Nothing in these rules should be deemed to create, augment, diminish, or eliminate any substantive legal duty of a mediator or the nondisciplinary consequences of violating such a duty.

Rule 1620.1. Application

(a) These rules apply to all mediators when serving in court-connected mediation programs for general civil cases. For purposes of these rules, a mediator is deemed to be serving in a court-connected mediation program when:

- (1) The mediator is selected from a list of mediators provided by the court to mediate a case pending in the court; or

(2) The mediator is recommended, selected, appointed, or compensated by the court to mediate a case pending in the court.

(b) Where a panel or list includes firms that provide mediation services, all mediators affiliated with a listed firm are required to comply with these rules when they are serving in a court-connected mediation program.

(c) These rules do not apply to judges or other judicial officers governed by the Code of Judicial Ethics while serving in that capacity.

Advisory Committee Comment

Subdivision (c). Although these rules do not apply to them, judicial officers who serve as mediators in their court's mediation programs or who use mediation techniques in conducting settlement conferences are nevertheless encouraged to be familiar with and observe these rules when mediating, particularly those rules concerning subjects, such as self-determination, that are not covered in the Code of Judicial Ethics.

Rule 1620.2. Definitions

As used in this Part, unless the context or subject matter otherwise requires:

(a) [Mediation] "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) [Mediation consultation] "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

(c) [Mediator] "Mediator" means a neutral person who conducts a mediation.

(d) [Participant] "Participant" means any individual, entity, or group taking part in a mediation, other than the mediator.

(e) [Party] "Party" means an individual, entity or group taking part in a mediation, who is a plaintiff, a defendant, a cross-complainant, a cross-defendant, or an intervenor in the case.

1 **Rule 1620.3. Voluntary participation and self-determination**

2
3 A mediator must conduct the mediation in a manner that supports the
4 principles of voluntary participation and self-determination by the parties.
5 For this purpose a mediator must:

- 6
7 **(a)** Inform the parties by no later than the outset of the first mediation
8 session that resolution of the dispute depends upon an uncoerced,
9 consensual agreement of the parties;
10
11 **(b)** Respect the right of each participant to decide the extent of his or her
12 participation in the mediation, including the right to withdraw from the
13 mediation at any time; and
14
15 **(c)** Refrain from coercing any party to make a decision or to unwillingly
16 continue to participate in the mediation.

17
18 **Advisory Committee Comment**

19 Voluntary participation and self-determination are fundamental principles of mediation that
20 apply both to mediations in which the parties voluntarily elect to mediate and to those in which
21 the parties are required to go to mediation in a mandatory court mediation program or by court
22 order. While participants may be mandated to the mediation process, a mediator may not
23 mandate the extent of their participation in the mediation process or coerce any party to settle the
24 case.

25
26 Nevertheless, after informing the parties of their choices and the consequences of such choices, a
27 mediator can invoke a broad range of approaches to assist the parties in reaching an agreement
28 without offending the principles of voluntary participation and self-determination, including
29 encouraging the parties to continue participating in the mediation when it reasonably appears to
30 the mediator that the possibility of reaching an uncoerced, consensual agreement has not been
31 exhausted and suggesting that a party consider obtaining professional advice (for example,
32 informing an unrepresented party that he or she may consider obtaining legal advice).
33 Conversely, examples of conduct that violate the principles of voluntary participation and self-
34 determination include the use of tactics such as coercing a party to continue participating in the
35 mediation after the party has told the mediator that he or she wishes to terminate the mediation,
36 providing an opinion or evaluation of the dispute in a coercive manner or over the objection of
37 the parties, using abusive language, and threatening to make a report to the court about a party's
38 conduct at the mediation.

39
40 **Rule 1620.4. Confidentiality**

- 41
42 **(a)** **[Compliance with confidentiality law]** Except as otherwise provided
43 by law or the agreement of the parties, all mediations and mediation
44 consultations are confidential. A mediator must conduct all mediations
45 and mediation consultations in accordance with the applicable law
46 concerning confidentiality.

1 **(b) [Informing participants of confidentiality]** By no later than the outset
2 of the first mediation session, a mediator must inform the participants
3 that, except as otherwise provided by law or the agreement of the
4 parties, all mediations and mediation consultations are confidential.
5

6 **(c) [Confidentiality of separate communications; caucuses]** If a mediator
7 speaks separately with one or more participants during the mediation
8 out of the presence of the other participants, the mediator must first
9 discuss with all participants the mediator's policy regarding
10 confidentiality for separate communications with the participants. A
11 mediator must not disclose information revealed in confidence during
12 such separate communications.
13

14 **(d) [Use of confidential information]** A mediator must not use information
15 acquired in confidence in the course of a mediation for personal gain or
16 to the detriment of any participant in the mediation.
17

18 **Rule 1620.5. Impartiality, conflicts of interest, disclosure, and withdrawal**
19

20 **(a) [Impartiality]** A mediator must maintain impartiality toward all
21 participants in the mediation process at all times. "Maintaining
22 impartiality" means conducting the proceedings in a fair and even-
23 handed manner, without favoring any party over another.
24

25 **(b) [Disclosure of matters potentially affecting impartiality]**
26

27 (1) A mediator must make reasonable efforts to keep informed about
28 matters that reasonably could raise a question about his or her
29 ability to conduct the proceedings impartially, and must disclose
30 those matters to the parties. These matters include, but are not
31 limited to:
32

33 (A) Past, present, and anticipated interests, relationships, and
34 affiliations of a personal, professional, or financial nature;
35 and
36

37 (B) The existence of any grounds for disqualification of a judge
38 specified in Code of Civil Procedure section 170.1.
39

40 (2) A mediator's duty to disclose is a continuing obligation, from the
41 inception of the mediation process through its completion.
42 Disclosures required by these rules must be made as soon as
43 practicable after a mediator becomes aware of a matter that must

1 be disclosed. To the extent possible, disclosures should be made
2 before the first mediation session, but in any event within the time
3 required by applicable court rules or statutes.
4

5 **(c) [Proceeding if there are no objections or questions concerning**
6 **impartiality]** Except as provided in subdivision (f) below, if, after a
7 mediator makes disclosures, no party objects to the mediator and no
8 participant raises any question or concern about the mediator's ability to
9 conduct the mediation impartially, the mediator may proceed.
10

11 **(d) [Responding to questions or concerns concerning impartiality]** If,
12 after a mediator makes disclosures or at any other point in the mediation
13 process, a participant raises a question or concern about the mediator's
14 ability to conduct the mediation impartially, the mediator must discuss
15 the question or concern with the participants. Except as provided in
16 subdivision (f) below, if, after this discussion, no party objects to the
17 mediator and no participant raises any further question or concern about
18 the mediator's ability to conduct the mediation impartially, the mediator
19 may proceed.
20

21 **(e) [Withdrawal upon party objection concerning impartiality]** If, after
22 a mediator makes disclosures or discusses a participant's question or
23 concern regarding the mediator's ability to conduct the mediation
24 impartially, any party objects to the mediator, the mediator must
25 withdraw.
26

27 **(f) [Circumstances requiring mediator recusal despite party consent]**
28 Regardless of the consent of the parties, a mediator must either decline
29 to serve as mediator, or if already serving, must withdraw from the
30 mediation if:
31

32 (1) The mediator served as an attorney in the matter in controversy;
33

34 (2) The mediator is or has been a material witness concerning the
35 matter in controversy;
36

37 (3) The mediator cannot maintain impartiality toward all participants
38 in the mediation process; or
39

40 (4) Proceeding with the mediation would jeopardize the integrity of
41 the court or of the mediation process.
42

1 **(g) [Consent to subsequent related services by mediator]** A mediator
2 must not provide any professional services substantially related to a
3 matter in which he or she served as a mediator without the informed
4 written consent of those who reasonably could be anticipated to be
5 affected by the services. When a mediator has received confidential
6 information from a participant as a result of serving as mediator in a
7 matter, the mediator must not, without the informed written consent of
8 that participant, accept employment in another matter in which the
9 confidential information is material.

10
11 **Advisory Committee Comment**

12 *Subdivision (b). This subdivision is intended to provide parties with information they need to*
13 *help them determine whether a mediator can conduct the mediation impartially. A mediator's*
14 *overarching duty under this subdivision is to inform parties about matters that, in the eyes of a*
15 *reasonable person, could raise a question about the mediator's ability to conduct the mediation*
16 *impartially. While subparagraph (1)(B) specifically requires disclosure of interests,*
17 *relationships, affiliations, and matters that are grounds for disqualification of a judge under*
18 *Code of Civil Procedure section 170.1, these are only examples of common matters that*
19 *reasonably could raise a question about a mediator's ability to conduct the mediation*
20 *impartially, and, thus, must be disclosed. The absence of particular interests, relationships,*
21 *affiliations, or section 170.1 matters does not necessarily mean that there is no matter that could*
22 *reasonably raise a question about the mediator's ability to conduct the mediation impartially. A*
23 *mediator must make determinations concerning disclosure on a case-by-case basis, applying the*
24 *general criteria for disclosure under paragraph (b)(1).*

25
26 *Under subparagraph (b)(1)(A), the interests, relationships, and affiliations that a mediator may*
27 *need to disclose include, but are not limited to: (a) prior, current, or anticipated service as a*
28 *mediator in another mediation involving any of the participants in the present mediation; (b)*
29 *prior, current, or anticipated business relationships or transactions between the mediator and*
30 *any of the participants; or (c) the mediator's ownership of stock or other significant financial*
31 *interest involving any participant in the mediation. Anticipated interests, relationships, and*
32 *affiliations may include, for example, an intention to form a partnership or to enter into a future*
33 *business relationship with one of the participants in the mediation.*

34
35 *Attorney mediators should be aware that under the section 170.1 standard, they may need to*
36 *make disclosures when an attorney in their firm is serving or has served as a lawyer for any of*
37 *the parties in the mediation. Section 170.1 does not specifically address whether a mediator must*
38 *disclose when another member of the mediator's dispute resolution services firm is providing or*
39 *has provided services to any of the parties in the mediation. Therefore, a mediator must evaluate*
40 *such circumstances under the general criteria for disclosure under paragraph (b)(1) – that is, is*
41 *it a matter that, in the eyes of a reasonable person, could raise a question about the mediator's*
42 *ability to conduct the mediation impartially?*

43
44 **Rule 1620.6. Competence**

45
46 **(a) [Compliance with court qualifications]** A mediator must comply with
47 experience, training, educational, and other requirements established by
48 the court for appointment and retention.

1 **(b) [Truthful representation of background]** A mediator has a continuing
2 obligation to truthfully represent his or her background to the court and
3 participants. Upon a request by any party, a mediator must provide
4 truthful information regarding his or her experience, training, education,
5 or background. A mediator must also inform the court if:

6
7 (1) Public discipline has been imposed on the mediator by any public
8 disciplinary agency or professional licensing board;

9
10 (2) The mediator has resigned his or her membership in the State Bar
11 or another licensing agency while disciplinary or criminal charges
12 were pending;

13
14 (3) A felony charge is pending against the mediator;

15
16 (4) The mediator has been convicted of a felony or misdemeanor; or

17
18 (5) There has been an entry of judgment against the mediator in any
19 civil action for actual fraud or punitive damages.

20
21 **(c) [Required skills]** A mediator must possess the skills, knowledge, and
22 ability to conduct a mediation effectively.

23
24 **(d) [Assessment of skills; withdrawal]** A mediator has a continuing
25 obligation to assess whether or not his or her level of skill, knowledge,
26 and ability is sufficient to conduct the mediation effectively. A
27 mediator must decline to serve or withdraw from the mediation if the
28 mediator determines that he or she does not have the level of skill,
29 knowledge, or ability to conduct the mediation effectively.

30
31 **Advisory Committee Comment**

32 *Subdivision (c). "Competence in mediation" refers to a mediator's ability to effectively use*
33 *mediation process skills and knowledge. No particular advanced academic degree or technical*
34 *or professional experience is a prerequisite for competence as a mediator. Some core mediation*
35 *skills include the ability to listen, to deal with complex factual materials and situations, and to*
36 *communicate clearly and in a neutral manner.*

37
38 *Subdivision (d). A mediator must consider and weigh a variety of issues in order to assess*
39 *whether his or her level of skill, knowledge, and ability is sufficient to be effective in a particular*
40 *mediation. Issues include whether the parties: (1) were involved or had input in the selection of*
41 *the mediator; (2) had access to information regarding the mediator's background or level of skill,*
42 *knowledge, and ability; (3) have a specific expectation or perception regarding the mediator's*
43 *level of skill, knowledge, and ability; (4) have expressed a preference regarding the style of*
44 *mediation they would like or expect; or (5) have expressed a desire to discuss legal or other*

professional information, to hear a personal evaluation or opinion of a set of facts as presented, or to be made aware of the interests of persons who are not represented in mediation.

Rule 1620.7. Quality of mediation process

(a) [Diligence] A mediator must make reasonable efforts to advance the mediation in a timely manner. If a mediator schedules a mediation for a specific time period, he or she must keep that time period free of other commitments.

(b) [Procedural fairness] A mediator must conduct the mediation proceedings in a procedurally fair manner. “Procedural fairness” means a balanced process in which each party is given an opportunity to participate. A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.

(c) [Explanation of process] A mediator must provide all participants with a general explanation of the nature of the mediation process, the procedures to be used, the confidentiality of the proceedings, and the roles of the mediator, the parties, and the other participants.

(d) [Representation and other professional services] A mediator must inform all participants no later than the outset of the first mediation session that he or she will not be representing any participant as a lawyer or performing professional services in any capacity other than as an impartial mediator. Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide.

(e) [Recommending other services] A mediator may recommend the use of other services in connection with a mediation, or particular providers of other services, if the recommendation is not for the personal gain of the mediator.

(f) [Nonparticipants’ interests] A mediator may bring to the attention of the parties the interests of others who are not participating in the mediation but who may be affected by agreements reached as a result of the mediation.

(g) [Combining mediation with other ADR processes] A mediator must exercise caution in combining mediation with other alternative dispute resolution (ADR) processes and may do so only with the informed consent of the parties and in a manner consistent with law or court

1 order. The mediator must inform the parties of the general nature of the
2 different processes and the consequences of revealing information
3 during any one process that may be used for decision-making in another
4 process, and must give the parties the opportunity to select another
5 neutral for the subsequent process. If the parties consent to the
6 combination of processes, the mediator must clearly inform the
7 participants when the transition from one process to another is
8 occurring.

10 **(h) [Settlement agreements]** Consistent with subdivision (d) of this rule, a
11 mediator may suggest possible settlement provisions. A mediator may
12 also assist the parties in preparing a written settlement agreement,
13 provided that in doing so the mediator confines the assistance to stating
14 the settlement as determined by the parties.

16 **(i) [Discretionary termination and withdrawal]** A mediator may suspend
17 or terminate the mediation or withdraw as mediator when he or she
18 reasonably believes the circumstances so require, including when he or
19 she suspects that:

21 (1) The mediation is being used to further illegal conduct;

23 (2) A participant is unable to participate in informed negotiations
24 because of physical or mental incapacity; or

26 (3) Continuation of the process would cause significant harm to any
27 participant or a third party.

29 **(j) [Manner of withdrawal]** When a mediator determines that it is
30 necessary to discontinue a mediation or to withdraw, the mediator must
31 do so without violating the obligation of confidentiality and in a manner
32 that will cause the least possible harm to the participants.

34 **Advisory Committee Comment**

35 **Subdivision (d).** Subject to the principles of impartiality and self-determination, and if qualified
36 to do so, a mediator may: (1) discuss a party's options, including a range of possible outcomes in
37 an adjudicative process; (2) offer a personal evaluation or opinion of a set of facts as presented,
38 which should be clearly identified as a personal evaluation or opinion; or (3) communicate the
39 mediator's opinion or view of what the law is or how it applies to the subject of the mediation,
40 provided that the mediator does not also advise any participant about how to adhere to the law or
41 what position the participant should take in light of that opinion.

43 One question that frequently arises is whether a mediator's assessment of claims, defenses, or
44 possible litigation outcomes constitutes legal advice or the practice of law. Similar questions
45 may arise when accounting, architecture, construction, counseling, medicine, real estate, or other

1 licensed professions are relevant to a mediation. This rule does not determine what constitutes
2 the practice of law or any other licensed profession. A mediator should be cautious when
3 providing any information or opinion relating to any field for which a professional license is
4 required, in order to avoid doing so in a manner that may constitute the practice of a profession
5 for which the mediator is not licensed, or in a manner that may violate the regulations of a
6 profession that the mediator is licensed to practice. A mediator should exercise particular
7 caution when discussing the law with unrepresented parties and should inform such parties that
8 they may seek independent advice from a lawyer.

9
10 **Subdivision (i).** Subparagraph (i)(2) is not intended to establish any new responsibility or
11 diminish any existing responsibilities that a mediator may have under the Americans with
12 Disabilities Act or other similar law to attempt to accommodate physical or mental disabilities of
13 a participant in mediation.

14 15 **Rule 1620.8. Marketing**

16
17 **(a) [Truthfulness]** A mediator must be truthful and accurate in marketing
18 his or her mediation services. A mediator is responsible for ensuring
19 that both the mediator's own marketing activities and any marketing
20 activities carried out on the mediator's behalf by others comply with
21 this rule.

22
23 **(b) [Representations concerning court approval]** Unless specifically
24 permitted by the court, a mediator must not indicate that he or she is
25 approved, endorsed, certified, or licensed by the court. This rule is not
26 intended to prohibit a mediator from indicating in his or her marketing
27 materials that he or she is a member of a particular court's panel or list.

28
29 **(c) [Promises, guarantees, and implications of favoritism]** In marketing
30 his or her mediation services, a mediator must not:

31
32 (1) Promise or guarantee results; or

33
34 (2) Make any statement that directly or indirectly implies favoritism.

35
36 **(d) [Solicitation of business]** A mediator must not solicit business from a
37 participant in a mediation proceeding while that proceeding is pending.

38 39 **Advisory Committee Comment**

40 **Subdivision (d).** This provision is not intended to prohibit a mediator from accepting another
41 mediation from a participant while the first matter is pending, so long as there was no express
42 solicitation of this business by the mediator. In addition, it is not intended to prohibit a mediator
43 from engaging in general marketing activities. General marketing activities include, but are not
44 limited to, running an advertisement in a newspaper or sending out a general mailing (either of
45 which may be directed to a particular industry or market).

1 **Rule 1620.9. Compensation**

- 2
- 3 **(a) [Compliance with law]** A mediator must comply with any applicable
- 4 requirements concerning compensation established by statute or the
- 5 court.
- 6
- 7 **(b) [Disclosure of and compliance with compensation terms]** If a
- 8 mediator is to be compensated for a mediation, the mediator must
- 9 clearly communicate the terms of his or her compensation to the parties
- 10 in writing before commencing the mediation. A mediator must abide by
- 11 any agreement that is reached concerning compensation.
- 12
- 13 **(c) [Unconscionable fees]** A mediator must not charge an unconscionable
- 14 fee for his or her services.
- 15
- 16 **(d) [Contingent fees]** The amount or nature of a mediator's fee must not be
- 17 made contingent upon the outcome of the mediation.
- 18
- 19 **(e) [Gifts and favors]** Except for fees for mediation services, a mediator
- 20 must not solicit, give, or accept any gift, bequest, or favor of significant
- 21 value from any participant or affiliate of a participant, from the time of
- 22 selection or appointment as mediator and continuing for two years after
- 23 the conclusion of the mediation.
- 24

25 **Advisory Committee Comment**

26 *Subdivision (b). It is good practice to put mediation fee agreements in writing, and mediators are*

27 *strongly encouraged to do so; however, nothing in this rule is intended to preclude enforcement*

28 *of a compensation agreement for mediation services that is not in writing.*

29 *Subdivision (e). Whether a gift, bequest, or favor has "significant value" must be determined on*

30 *a case-by-case basis. This subdivision is not intended to prohibit a mediator from accepting*

31 *other employment as a mediator from any of the participants, consistent with rule 1620.8(d).*

32

33 **Rule 1622. Complaint procedure**

- 34
- 35 **(a)** Each court that makes a list of mediators available to litigants in general
- 36 civil cases or recommends, selects, appoints, or compensates a mediator
- 37 to mediate any general civil case pending in the court must establish
- 38 procedures for receiving, investigating, and resolving complaints
- 39 against mediators serving in the court's mediation programs.
- 40
- 41 **(b)** The court may reprimand a mediator, remove a mediator from the
- 42 court's panel or list, or otherwise prohibit a mediator from receiving
- 43 future mediation referrals from the court if the mediator fails to comply

1 with the rules of conduct for mediators in court-connected mediation
2 programs for civil cases established by this Part.
3

4 **Advisory Committee Comment**

5 Section 16 of the Standards of Judicial Administration sets out recommendations concerning the
6 procedures that a court should use in receiving, investigating, and resolving complaints against
7 commissioners and referees and may serve as guidance in adopting procedures for receiving,
8 investigating, and resolving complaints against mediators.